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United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

April 23, 2008

The Honorable Lindsey Graham
United States Senate
290 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Elizabeth Dole
United States Senate
555 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Richard Burr
United States Senate
217 Russell Senate Office Building
Washington, DC 20510

The Honorable Jim DeMint
United States Senate
340 Russell Senate Office Building
Washington, DC 20510

Dear Senators Graham, Dole, Burr and DeMint:

I write in response to your recent joint letter.

I have been concerned about vacancies on the Fourth Circuit Court of Appeals long before this year. The reason there is an emergency vacancy on the Fourth Circuit from North Carolina is because the Republican majority refused to consider any of President Clinton's nominees. All four nominees from North Carolina to the Fourth Circuit were blocked from consideration by the Republican Senate majority. These outstanding nominees included United States District Court Judge James Beaty, Jr., United States Bankruptcy Judge J. Richard Leonard, North Carolina Court of Appeals Judge James Wynn and Professor Elizabeth Gibson. The failure to proceed on these nominations has yet to be explained. Had either Judge Beaty or Judge Wynn been considered and confirmed, he would have been the first African-American judge appointed to the Fourth Circuit.

In contrast, I worked with Senator Edwards to break through the impasse and to confirm Judge Allyson Duncan of North Carolina to the Fourth Circuit when President Bush nominated her. We could have made even more progress in North Carolina if we had not wasted over six years of the Committee's time debating President Bush's repeated nomination of Terry Boyle. His high reversal rate and failure to follow settled law led to his nomination being opposed by a coalition of law enforcement and civil rights groups, and it was ultimately withdrawn.

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I do not think you recall that I worked hard to reduce the Federal judicial vacancies in North Carolina with the confirmations of Judge Schroeder, Judge Reidinger and Judge Osteen. Previously, during the Bush administration we cooperated in the confirmation of Judge Whitney, Judge Conrad, Judge Dever, Judge McKnight and Judge Flanagan. That totals nine Federal judges including a Fourth Circuit judge. By contrast, during the entire eight years of the Clinton administration, one district court judge was confirmed in North Carolina.

Senator Graham follows Senator Thurmond as South Carolina's representative on the Judiciary Committee. Despite the controversy that accompanied the nomination of Judge Dennis Shedd, and my own opposition to it, I presided as chairman when we considered that nomination and when the Senate granted its consent. I also presided over consideration of the nomination of Terry Wooten. More recently, we acted favorably on the nominations of Harvey Floyd and Robert Bryan Harwell. As he knows, I had been discussing the Matthews nomination with Senator Graham privately.

While I chaired the Senate Judiciary Committee during a portion of the 107th Congress, I presided over the consideration and confirmation of three Fourth Circuit judges. All together, President Bush has already appointed five judges to the Fourth Circuit. By contrast, President Clinton was allowed by Senate Republicans to appoint three.

For your information I enclose a copy of my April 16 statement to the Senate. As you can see, I intend to proceed next to a nomination to the Fourth Circuit. It is that of Steven Agee of Virginia. I have already noticed his hearing for May 1. The nomination of Steven Agee is to one of Virginia's long vacant Fourth Circuit seats. It is my hope that this will help us to make progress in filling a longstanding vacancy on the Fourth Circuit.

The Agee nomination is a breakthrough that affords us the opportunity to be productive after years of contentiousness. President Bush had until recently insisted on nominations like those of Jim Haynes, Claude Allen and Duncan Getchell. You will recall that Mr. Getchell did not have the necessary support of either Senator Warner or Senator Webb. I have been working with the Virginia Senators. Their successful efforts working with the White House are to be commended. I am proceeding to the Agee nomination to reward the President for cooperating with the Senate in making this nomination.

Of course, during the Clinton administration, Republican Senators argued that the Fourth Circuit vacancies did not need to be filled because the Fourth Circuit had the fastest docket time to disposition in the country. That was the period when Fourth Circuit vacancies rose to five. After the confirmation of Steven Agee of Virginia, the Fourth Circuit will have fewer vacancies than it did when Republicans claimed no more judges were needed.

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I also have announced that I intend to proceed promptly to consideration of the nominations of Ray Kethledge and Judge Helene White to the Sixth Circuit. I have long urged the President to work with the Michigan Senators, and, after seven years, he finally has. Last week, our extensive efforts culminated in a significant development that can lead to filling the last two vacancies on the Sixth Circuit before this year ends. This accomplishment stands in sharp contrast to the actions of Senate Republicans who refused to consider any nomination to the Sixth Circuit Court of Appeals during the last three years of the Clinton administration. Ultimately, the Republican-led Senate left open four vacancies on that circuit. If we are successful in considering these nominations and confirming them this year, the Sixth Circuit will have no vacancies.

When the Republican Senate majority stalled consideration of President Clinton's judicial nominees, they more than doubled the circuit court vacancies from 12 to 26 during the last five years of the Clinton administration. Those circuit vacancies grew to 32 during the transition to the Bush administration. We have been able to reverse that. Today, circuit court vacancies have been reduced to only 12 – instead of 32 – across the Nation, less than at any time since the 1996. With the recent breakthroughs we have accomplished in the Fourth and Sixth Circuits, we are poised to lower circuit vacancies to single digits for the first time in decades.

The breakthroughs in these circuits will help us continue the work we have done that has led to a reduction in vacancies in nearly every circuit. We have already cut Sixth Circuit vacancies in half, and lowered vacancies in the Second Circuit, the Fifth Circuit, the Eighth Circuit, the Ninth Circuit, the Tenth Circuit, the Eleventh Circuit, the D.C. Circuit and the Federal Circuit. Both the Second and Fifth Circuits had circuit-wide emergencies due to the multiple simultaneous vacancies during the Clinton years with Republicans in control of the Senate. Both the Second Circuit and the Fifth Circuit now are without a single vacancy. Circuits with no vacancies also include the Seventh Circuit, the Eighth Circuit, the Tenth Circuit, the Eleventh Circuit and the Federal Circuit. That is five circuits without a single vacancy due to our efforts. The Sixth Circuit is poised to join them after our recent breakthrough if we focus on finishing the job and do not breakdown into partisanship.

Indeed, the only circuit that has more vacancies than it did at the end of the Clinton administration is the First Circuit, which has gone from no vacancies to a single one. The other three circuits, the Third, the Fourth and the Seventh have the same number of vacancies today that they had at the end of the Clinton administration. When we take action on the Agee nomination for your Circuit, even that Circuit will be in an improved posture.

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Democrats have not acted as Republicans did during the Clinton administration when Republicans pocket filibustered more than 60 judicial nominations and voted lock step against the confirmation of Ronnie White. I still await an acknowledgement of Republican responsibility and acceptance of accountability for those actions during those years. The Democratic Senate majority has not engaged in a tit-for-tat. Rather, by cutting the vacancies as we have, we have taken a giant step toward resolving problems. We are now, finally, on course to resolve a longstanding impasse in the Fourth Circuit and in the Sixth Circuit. I prefer to make progress where we can in this presidential election year, and to work together to do so. By moving our attention to more controversial nominations, we not only risk a contentious debate, but we would, in effect, be rejecting the White House's recent efforts to work with us to resolve impasses in the Sixth Circuit and in your own Fourth Circuit.

With your cooperation in the years ahead, I am confident we will be able to fill the remaining vacancies in the Federal courts in North and South Carolina. We have already made significant progress. I am sure there are some who prefer partisan fights designed to energize a political base, but I do not. I have tried to be productive.

We have seen the risk we run if we turn the Committee's attention to more controversial nominations that could embroil it in debate for months and foreclose the opportunity to make progress where we can. The last contentious judicial nomination was that of Leslie Southwick. The process of Senate consideration from the time of the hearing to his confirmation was five and one-half months.

The last several months of the last Congress provide another example. With a Republican chairman, the Committee held many hearings on many controversial nominations. That resulted in a great deal of effort and conflict, but not in as many confirmations as might have been achieved.

I trust you find this responsive to your scheduling request and that you understand the broader perspective I am taking as the chair of the Committee. I look forward to continuing to work with you in the future.

Sincerely,



PATRICK LEAHY
Chairman